7

No. 91-1671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLIAM J. MERTENS, *et al.*,
Petitioners,
v.
HEWITT ASSOCIATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

LAUREN M. BLOOM
AMERICAN ACADEMY OF ACTUARIES
1720 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-8196
Counsel of Record for the
American Academy of Actuaries

[illegible] Co., Inc. · [illegible] · Washington, D.C. [illegible]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 91-1671

WILLIAM J. MERTENS, *et al.*,
Petitioners,
v.
HEWITT ASSOCIATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

The American Academy of Actuaries submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of respondent in No. 91-1671, having obtained the written consent of both the petitioners and the respondent to do so. Said written consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties (including pension and health) prac-

ticing within the United States, and to seek greater public recognition for the actuarial profession. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a requirement in many states to perform certain types of actuarial work. The Academy's primary activities include: the promulgation and implementation of standards of professional conduct, practice and qualification; liaison with federal and state governments; relations with other professions; and dissemination of public information about the actuarial profession. The Academy's membership exceeds 11,000 actuaries nationwide.

The Academy maintains a Code of Professional Conduct to govern the professional ethics of its members;[1] the Code is administered by the Actuarial Board of Counseling and Discipline (the "ABCD"). The ABCD is an independent body created to maintain a high quality of actuarial practice. The Academy and four other United States actuarial organizations have delegated to the ABCD responsibility to investigate complaints against their members, and to counsel their members concerning the application of standards of practice, conduct and qualification to their professional activities. The ABCD is also authorized to recommend to the Academy and other organizations that public discipline in the form of reprimand, suspension or expulsion from membership be taken against actuaries who are members of these organizations where serious violations have occurred.

To be eligible to provide actuarial services to employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, actuaries must be licensed by the Joint Board for the Enrollment of Actuaries ("the Joint Board"), an institution maintained by the United States Department

[1] The Academy's Code of Professional Conduct is reproduced in the Appendix to this brief.

of the Treasury and the United States Department of Labor. Approximately ninety percent of the "enrolled actuaries" in the United States are members of the Academy, and are subject to oversight by both the Joint Board and the Academy. These actuaries work closely with plan fiduciaries, and the Court's decision in this case is likely to have a significant effect upon their professional activities. Accordingly, the Academy and its members have a substantial interest in this proceeding.

SUMMARY OF ARGUMENT

The imposition of fiduciary duty upon non-fiduciaries serving employee benefit plans would be inconsistent with the express language of ERISA and contrary to Congressional intent. The statute does not provide for such a cause of action, and Congress has specifically declined to amend ERISA to impose liability upon non-fiduciaries for knowing participation in breaches of fiduciary duty. Given the evident care with which the enforcement scheme of ERISA was crafted, it must be presumed that Congress' refusal to amend that scheme was intentional. The Court should not construe ERISA to provide for a cause of action that Congress has specifically considered and rejected. Further, the interpretation of ERISA urged by the petitioners would render meaningless ERISA's carefully-crafted definition of "fiduciary," making fiduciaries and non-fiduciaries almost identically liable despite the significant differences in their levels of responsibility for administration of plan assets. The plain language of ERISA limits to a specific civil penalty, imposed only in suits brought by the Secretary of Labor, the liability of non-fiduciaries who knowingly participate in breaches of fiduciary duty. No greater liability should be implied.

Moreover, there currently exist significant restraints to prevent actuaries and other non-fiduciaries working under ERISA from knowingly participating in a fiduciary breach. The civil penalty imposed by Section 502(*l*)

of ERISA is a deterrent to would-be participants in fiduciary breaches, as are ERISA's prohibition of party-in-interest transactions and the risk of suit to obtain the equitable remedies available under the statute. An enrolled actuary practicing under ERISA faces substantial penalties, including the possible loss of enrollment status, for failure properly to discharge his or her statutory responsibilities under ERISA. An actuary who is an Academy member and fails to perform professional duties under ERISA in accordance with applicable standards of practice and conduct may be disciplined by, and even expelled from, the Academy. Thus, it is not necessary to manufacture a cause of action in this suit to protect the interests of ERISA plan participants.

However, even if the Court finds that a cause of action for knowing participation in a breach of fiduciary duty should be read into ERISA in some circumstances, the elements of such a cause of action have not been articulated here. All of the petitioners' allegations against the defendant actuarial firm involve only the setting of actuarial assumptions that may not have adequately reflected changes in circumstances surrounding the plan. The setting of actuarial assumptions has not traditionally been regarded by the courts as fiduciary activity under ERISA, because it does not involve discretionary administration of the plan or its assets. Thus, the mere allegation that actuarial assumptions were set improperly is not sufficient to establish a breach of fiduciary duty in which the actuaries could have participated. Moreover, the respondent actuaries have been accused of *knowing* participation in a fiduciary breach. The setting of actuarial assumptions has not been regarded by the courts as fiduciary activity and, therefore, the actuaries in this case cannot be charged with knowledge that the setting of allegedly inaccurate actuarial assumptions would constitute a fiduciary breach or participation therein.

Professionals who render services to employee benefit plans generally lack fiduciary discretion to administer

plans, are not involved in the management or disposition of plan assets, and should not be held responsible for a fiduciary's abuse of that discretion. A professional who fails to perform services in an appropriate manner should be subject to existing penalties that do not involve fiduciary liability. The Court is urged not to impose upon non-fiduciaries a level of liability that is disproportionate to their authority.

ARGUMENT

I. IMPOSITION OF FIDUCIARY DUTY UPON NON-FIDUCIARIES WOULD BE INCONSISTENT WITH ERISA

A. Congress Has Considered And Rejected Petitioners' Proposed Cause Of Action

The stated purpose of ERISA is to "protect . . . the interests of participants in employee benefit plans and their beneficiaries," in part "by establishing standards of conduct, responsibility, and obligation for *fiduciaries of employee benefit plans* . . . ." 29 U.S.C. § 1001(b) (emphasis added). As this Court has recognized, "ERISA is a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981), *quoting Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). In order to achieve ERISA's objectives, Congress carefully crafted into the statute what the Court has characterized as an "interlocking, interrelated and interdependent remedial scheme" consisting of "six carefully integrated enforcement provisions." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985). However, the petitioners in this case invite the Court to read into ERISA a cause of action against non-fiduciaries that is not expressly included in the statute's enumerated remedies. The Court in *Russell* refused to add to ERISA's enforcement provisions a cause of action not expressly articulated in the statute, *id.* at 148, and is urged to decline petitioners' invitation here.

When enacting ERISA, Congress expressed its intent to make applicable to ERISA fiduciaries " 'certain principles developed in the evolution of the law of trusts.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1988), *quoting* H.R. Rep. No. 533, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649. The legislative history of ERISA indicates that Congress intended to "apply rules and remedies similar to those under traditional trust law to govern *the conduct of fiduciaries*." H.R. Rep. No. 1280, 93d Cong., 2d Sess. 2, *reprinted in* III Legislative History of the Employee Retirement Income Security Act of 1974 at 4277, 4562 (1974) (emphasis added). This is not to say, however, that Congress intended to apply those principles with equal force to non-fiduciaries, or that ERISA was intended to be nothing more than a codification of the common law of trusts. To the contrary, Congress recognized that "reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries." H.R. Rep. No. 533, *supra*, 1974 U.S. Code Cong. & Admin. News at 4650. For that reason, when Congress drafted ERISA "[t]he principles of fiduciary conduct [were] adopted from existing trust law, but with modifications appropriate for employee benefit plans." *Id.*, 1974 U.S. Code Cong. & Admin. News at 4643. It is entirely reasonable to presume that these "appropriate modifications" included statutory remedies that were not identical to those available under common law, but that appeared more appropriate to fulfill Congress' legislative purposes.

Indeed, Congress has considered and rejected an amendment to ERISA that would have explicitly provided for the cause of action that the petitioners seek to read into the statute in this case. In 1989, Congress considered whether to amend ERISA through the Omnibus Budget Reconciliation Act to specifically state that non-fiduciaries are liable for knowing participation in a breach of fiduciary duty, in order to resolve the difference of opinion

on the subject that had arisen between the United States Courts of Appeal in several federal circuits. *See* H.R. Rep. No. 3299, 101st Cong., 1st Sess. § 3151(e)(6), *reprinted in* 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). The proposed amendment was rejected, and Congress amended ERISA to direct the Secretary of Labor to impose upon non-fiduciaries who knowingly participate in a breach of fiduciary duty a civil penalty of twenty percent of the "applicable recovery amount." *See* 29 U.S.C. § 1132(l) (Supp. II 1990).[2]

Thus, the petitioners do not simply ask the Court to read into ERISA a cause of action that is not expressly included in the statute; they ask the Court to find that the statute implicitly includes a cause of action that Congress has specifically rejected. Petitioners claim that Congress' failure to adopt the proposed amendment is not persuasive "because ' "several equally tenable inferences" ' may be drawn" from Congress' action. Petitioners' Brief at 17, *quoting Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) and *United States v. Wise*, 370 U.S. 405, 411 (1962). However, as the Court has stated, Congress' rejection of a proposed amendment "strongly mitigates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 201 (1974).

---

[2] Petitioners argue that no recovery could be had against non-fiduciaries under 29 U.S.C. § 1132(l) unless ERISA "already encompassed monetary relief from non-fiduciaries" because the penalty assessed under 29 U.S.C. § 1132(l) is a percentage of a "recovery amount" that must be a sum to be recovered from the non-fiduciary. Petitioners' Brief at 15. This argument ignores the possibility that the "recovery amount" could be the amount recovered from the fiduciary for a breach of fiduciary duty, or could represent an amount recovered from a non-fiduciary who participated in a prohibited transaction as a party-in-interest under 29 U.S.C. § 1106. Indeed, Section 1132(l)(4) provides for a reduction in the penalty for any taxes or penalties paid under the prohibited transaction provisions.

Given the "evident care" with which the enforcement scheme of ERISA was crafted, *Russell*, *supra*, at 147, it must be presumed that Congress' refusal to amend that scheme was intentional. The Court has already declined to infer that Congress intended to authorize other remedies "that it simply forgot to incorporate expressly." *Id.* at 146. The only available evidence indicates that Congress not only did not "forget" to authorize the remedy sought, but deliberately chose to impose upon non-fiduciaries who knowingly participate in a breach of fiduciary duty a specific, mandatory civil penalty, instead of adopting a common law cause of action that would merely duplicate a claim that may be brought under ERISA against the breaching fiduciary. *Cf.* 29 U.S.C. § 1109(a). The Academy urges the Court not to graft onto ERISA a remedy that Congress declined to adopt.[3]

B. Petitioners' Proposed Cause of Action Is Inconsistent With ERISA's Definition Of Fiduciary Duty

Petitioners' efforts to impose liability upon non-fiduciaries for participation in an alleged breach of fiduciary duty would effectively eliminate the clear distinction between fiduciaries and non-fiduciaries drawn by Congress when ERISA was enacted. Under the statute, an individual is a fiduciary

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or

[3] *Amicus curiae* American Association of Retired Persons argues that the relief sought by petitioners is consistent with *Russell* because it is "equitable relief" within the meaning of 29 U.S.C. § 1132(a)(3). The Court unquestionably has authority to "develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone*, *supra*, *quoting Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). However, the Academy believes it would be an abuse of the Court's authority to read into the phrase "equitable relief" a cause of action that Congress refused to adopt.

> control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Unlike a party who merely provides ministerial services or advice (other than investment advice) to a plan, a fiduciary has substantial responsibility, and owes the plan a significant duty of care. The fiduciary must discharge his or her duties in the interests of the participants and beneficiaries, and must administer the plan and its assets with the same prudence that the trustee would use in his or her personal business affairs. 29 U.S.C. § 1104(1)(A). The fiduciary must diversify the plan's investments to minimize large losses, 29 U.S.C. § 1104(1)(C), and must function in accordance with plan documents to the extent they are consistent with ERISA. 29 U.S.C. § 1104(1)(D). The fiduciary must not involve the plan in a transaction that the fiduciary knows or should have known would be a prohibited party-in-interest transaction, 29 U.S.C. § 1106. Moreover, a fiduciary who "participates knowingly in . . . an act or omission of [another] fiduciary, knowing such act or omission is a breach" may be held jointly and severally liable for such breach. 29 U.S.C. § 1105. ERISA imposes no such requirements or liability upon non-fiduciaries.

Recognizing the importance of the special responsibilities imposed upon the fiduciary by ERISA, Congress has imposed special liability upon a fiduciary who fails to satisfy statutory requirements. A fiduciary who breaches his or her statutory duties faces specific, personal liability for any losses sustained by the plan, is required to disgorge any profits garnered through use of plan assets, and is subject to other appropriate "equitable or remedial

relief . . . including the removal of such fiduciary." 29 U.S.C. § 1109(a). No similar liability is expressly imposed upon non-fiduciaries.

In crafting ERISA, Congress clearly focused upon fiduciaries, and sought to impose special liability upon them commensurate with the special responsibilities a fiduciary bears. The lesser civil penalty imposed by 29 U.S.C. § 1132(*l*) is consistent with Congress' recognition of the lesser responsibilities of non-fiduciaries under ERISA. To impose identical liability upon non-fiduciaries for participation in a fiduciary breach would weaken the distinction between fiduciaries and non-fiduciaries established by Congress, and could thereby lessen fiduciaries' appreciation of the magnitude of their personal responsibilities to ERISA plans. Such a result would conflict with ERISA's language and Congress' legislative objectives.

II. ADEQUATE PROTECTION FOR PLAN PARTICIPANTS AND BENEFICIARIES EXISTS WITHOUT IMPOSING FIDUCIARY DUTY UPON NON-FIDUCIARIES

Contrary to petitioners' assertions, the imposition of fiduciary responsibility upon non-fiduciaries is not necessary to protect the interests of plan participants and beneficiaries. The civil penalty imposed upon non-fiduciaries by 29 U.S.C. § 1132(*l*) for knowing participation in a fiduciary breach is a "substantial monetary sanction[]," Petitioners' Brief at 14, and should serve as a powerful deterrent to prevent non-fiduciaries from participating in a fiduciary's breach of duty. Moreover, to the extent that a non-fiduciary is also a party in interest, ERISA specifically prohibits that party from entering into transactions with the plan from which the non-fiduciary would take unjust enrichment. 29 U.S.C. § 1106. The equitable remedies provided by 29 U.S.C. § 1132(3)(B) may also be available against a non-fiduciary to remedy a violation of ERISA. For example, if an actuary deliberately selected unreasonable assumptions, a court could order the actuary to cease using

those assumptions, and to substitute assumptions that would result in full funding of the plan.

Actuaries who serve plans governed by ERISA face additional significant deterrents to misconduct. To perform services under ERISA, an actuary must be approved by the Joint Board for the Enrollment of Actuaries. 20 C.F.R. § 901.2(a). Actuaries who are enrolled by the Joint Board are specifically required by federal regulation to perform actuarial work under ERISA with due skill, care, prudence and diligence. 20 C.F.R. § 901.20(e). The enrolled actuary must disclose any conflict of interest to the plan trustees, any named fiduciary of the plan, the plan administrator, and the collective bargaining representative, if any. 20 C.F.R. § 901.20(d). The enrolled actuary must also decline to perform professional services if the actuary believes that his or her services may be used in a manner that is fraudulent or inconsistent with law. 20 C.F.R. § 901.20(b). Failure to discharge these regulatory obligations may be grounds for the actuary's enrollment status to be suspended or terminated. 20 C.F.R. § 901.31(b). Loss of enrollment status is deemed to be so serious that the Internal Revenue Service has proposed that enrolled actuaries who lose their enrollment status be suspended from practice before the Internal Revenue Service on an expedited basis. *See* Notice of Proposed Rule Making, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service*, 57 Fed. Reg. 46356, 46360 (Oct. 8, 1992).

The Academy's Code of Professional Conduct also prohibits its members from engaging in misconduct. Precept 2 of the Code requires Academy members to "perform professional services with integrity, skill and care." Precept 8 of the Code prohibits members from performing professional services involving a conflict of interest unless the actuary's ability to act fairly is unimpaired, there

has been full disclosure of the conflict, and all direct users have expressly agreed to the performance of the services by the actuary. Precept 9 of the Code prohibits a member from performing services if the member has reason to believe those services "may be used to violate or to evade the law." Departure from the Code of Professional Conduct could bring an Academy member before the ABCD and, if the member's failure to comply with the Code was sufficiently severe, could lead to public reprimand, or suspension or expulsion from membership. The Academy believes it unlikely that its members, who regard themselves as highly skilled professionals, would lightly risk the public disgrace of being expelled from the Academy for failure to comply with their ethical responsibilities.

Thus, an actuary providing services to an employee benefit plan governed by ERISA already has substantial reason to avoid intentional misconduct. The Court need not read into ERISA a cause of action not expressly provided by the statute to protect plan participants and beneficiaries from the unlikely occurrence that an actuary will risk a substantial civil penalty and imposition of equitable remedies, as well as possible loss of enrollment status, authorization to practice before the Internal Revenue Service, and Academy membership to knowingly participate in a fiduciary's breach of statutory duty.[4]

III. NO LEGALLY-COGNIZABLE BREACH OF FIDUCIARY DUTY HAS BEEN ALLEGED

Although petitioners presume that respondent has knowingly participated in a breach of fiduciary duty, the nature of the alleged breach has never been specifically

[4] Many actuaries maintain errors and omissions insurance to protect them from the consequences of any inadvertent errors in their professional practice. Knowing participation in a breach of fiduciary duty typically would be excluded from coverage under these policies, while the breaching fiduciary is likely to be covered by fiduciary insurance or indemnified by the employer for the breach.

articulated. Petitioners have simply asserted that respondent " 'delegated the responsibility for selecting actuarial assumptions to Kaiser.' " *Petitioner's Brief* at 6, *quoting Mertens v. Hewitt Associates*, 948 F.2d 607 (9th Cir. 1991). It is by no means clear that the setting of actuarial assumptions, taken alone, constitutes "fiduciary activity" for purposes of ERISA.[5]

As the Court has recognized, "[a] fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets . . ." when determining what constitutes "fiduciary activity". *Russell, supra*, 473 U.S. at 142-43. Courts have generally agreed that the performance of functions not involving discretionary management of plan assets does not implicate ERISA's fiduciary duty provisions, even if the individuals involved have some responsibility for plan administration. *See, e.g.*, *Anoka Orthopaedic Associates, P.A. v. Lechner*, 910 F.2d 514 (8th Cir. 1990) (attorney and accountants who performed ministerial tasks for plan not ERISA fiduciaries); *Richardson v. U.S. News & World Report*, 623 F. Supp. 350, 352 (D.D.C. 1985) and cases cited therein (trustee performing wholly non-discretionary functions is not ERISA fiduciary). *See also* 29 C.F.R. § 2509.75-8 at D-2 (statement of the Department of Labor that persons who perform ministerial functions for plans are not ERISA fiduciaries). Indeed, petitioners have not even clearly alleged that Kaiser was acting as a fiduciary when setting actuarial assumptions, rather than making a business decision to which fiduciary responsibility under ERISA would not apply. *Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-61 (3d Cir. 1990)

[5] Petitioners' other accusations, *inter alia*, that respondent performed actuarial work for the plan sponsors at the same time as the plan without disclosing any potential conflict of interest to the plan administrators, do not implicate any wrongdoing on the part of a plan fiduciary and, therefore, cannot support a claim of participation in a fiduciary breach.

(employer that was also plan administrator did not act as fiduciary when making business decision to amend severance plan); *Local Union 2134, UMW of America v. Powhatan Fuel*, 828 F.2d 710, 713-14 (11th Cir. 1987) (corporate officer who is also fiduciary does not act as fiduciary when making business decisions for corporation).

The one court of appeals that has specifically considered whether actuarial work constitutes fiduciary activity under ERISA concluded that it does not. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court reviewed ERISA's express language and legislative history, and ruled that Congress did not intend actuaries rendering professional services to plans to be regarded as ERISA fiduciaries. *Id.* at 535-36. The court acknowledged that an actuary could become a fiduciary by "undertak[ing] tasks that transcend the usual scope of a professional-client relationship." *Id.* at 538, *citing* 29 C.F.R. § 2509.75-5. However, the *Pappas* court specifically declined to hold that actuaries become fiduciaries by performing professional functions in a tortious manner, "regardless of what capacity they are acting in when their tortious deeds occur." *Id.* at 538. An allegation that an actuary negligently performed professional functions, without more, is not sufficient to establish that the actuary "transcended the normal role of an actuary providing advice to an ERISA plan." *Id.*[6] Given that the setting of actuarial assumptions does not involve administration of the plan or the management or disposition of plan assets, and therefore cannot be deemed to be fiduciary activity, the petitioners have failed to allege that a breach of fiduciary duty occurred in which the respondent actuaries could have participated.

[6] It should be noted that the court below specifically held that, in this case, "no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary." *Mertens, supra*, 948 F.2d at 610.

It should also be emphasized that the respondent actuaries are accused not of negligence, but of *knowing* participation in a fiduciary breach. In light of the *Pappas* court's specific ruling that the performance of actuarial services (which includes the setting of actuarial assumptions) is not fiduciary activity, the respondent actuaries would have had no reason to anticipate that the setting of actuarial assumptions as described by petitioners could lead to a fiduciary breach. The facts as alleged by the petitioners are, therefore, insufficient to establish the existence of knowing participation in this case.

An actuary providing professional services to an ERISA plan does not have direct access to or discretionary authority over the plan's assets. It would be inconsistent with the legislative emphasis of ERISA to make no distinction between those non-fiduciary actuaries and fiduciaries whose substantial authority merits commensurate liability. As we have shown, actuaries already face significant penalties for failure to perform work in a professional manner. If an actuary does not meet his professional obligations, those penalties should be imposed. Similarly, if an actuary engages in unusual activity and transcends the traditional professional role to become a fiduciary for purposes of ERISA, the higher standard of liability imposed upon fiduciaries under the statute should apply. However, actuaries and other non-fiduciaries who provide ordinary professional services to plans should not be subjected to special liability that is disproportionate to their responsibilities and authority. Under ERISA, it is ultimately the fiduciary who is, and should remain, primarily responsible for any breach of fiduciary duty.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

LAUREN M. BLOOM
AMERICAN ACADEMY OF ACTUARIES
1720 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-8196
Counsel of Record for the American Academy of Actuaries

December 21, 1992

APPENDIX

APPENDIX

CODE OF PROFESSIONAL CONDUCT OF THE AMERICAN ACADEMY OF ACTUARIES

Preamble

The Precepts of this Code of Professional Conduct identify the professional and ethical standards by which the actuary is expected to abide and thereby serve the public interest. The Annotations provide additional explanatory, educational and advisory material to members of the actuarial profession on how the Precepts are to be interpreted and applied. It is the professional responsibility of the actuary to be knowledgeable about the Code of Professional Conduct, and to keep current with revisions to its Precepts and Annotations.

Professional Integrity

PRECEPT 1. An actuary shall act honestly and in a manner to uphold the reputation of the actuarial profession and to fulfill the profession's responsibility to the public.

PRECEPT 2. An actuary shall perform professional services with integrity, skill and care.

> *ANNOTATION 2-1.* The term "professional services" as used in the Code of Professional Conduct refers to the rendering of advice, recommendations or opinions based upon actuarial considerations, and also includes other services provided from time to time by an actuary to a client or employer.

Qualification Standards

PRECEPT 3. An actuary shall perform professional services only when the actuary is qualified to do so and meets applicable qualification standards.

ANNOTATION 3-1. It is the professional responsibility of the actuary to observe applicable qualification standards and to keep current regarding changes in those standards. For practice in the United States, the Qualification Standards promulgated by the American Academy of Actuaries apply. For practice in Canada, the eligibility conditions promulgated by the Candian Institute of Actuaries apply.

Practice Standards

PRECEPT 4. An actuary shall ensure that professional services performed by or under the direction of the actuary meet applicable practice standards.

ANNOTATION 4-1. It is the professional responsibility of the actuary to keep current regarding generally accepted principles and standards of practice in the jurisdiction in which the actuary renders professional services. For practice in the United States, the Standards of Practice promulgated by the Actuarial Standards Board apply. For practice in Canada, the Standards of Practice promulgated by the Canadian Institute of Actuaries apply.

ANNOTATION 4-2. Where there is a question regarding the applicability of a practice standard, the professional judgment of the actuary should prevail. In any event, the actuary must be prepared to explain to peers the reasons for the determination made.

ANNOTATION 4-3. Laws and regulations may establish restraints and obligations on the part of the actuary towards designated publics. The requirements of laws and regulations are binding; but when such requirements are in conflict with practice standards, they should be identified as flowing directly from the laws and regulations and not from professional considerations.

Disclosure

PRECEPT 5. An actuary shall, in communicating professional findings, indicate clearly that the actuary is the source of the findings and is available to provide supplementary information and explanation.

ANNOTATION 5-1. An actuary who makes an actuarial communication assumes responsibility for it except to the extent the actuary disclaims responsibility by stating reliance on other sources. Reliance on other sources means making use of those sources without assuming responsibility therefor. A communication making use of any such reliance should define the extent of reliance.

ANNOTATION 5-2. Any written communication of professional findings must be signed with the name of the actuary who is responsible for it. The name of an organization with which the actuary is affiliated may be incorporated into the signature but the actuary's responsibilities and those of the organization are not affected by the form of the signature.

PRECEPT 6. An actuary shall, in communicating professional findings, identify the client or employer for which such findings are made and in what capacity the actuary serves.

PRECEPT 7. An actuary shall make full and timely disclosure to a client of the sources of all direct and indirect compensation that the actuary or the actuary's firm may receive in relation to an assignment for which the actuary provides professional services for that client.

ANNOTATION 7-1. An actuary who is not financially and organizationally independent concerning any matter related to the subject of an actuarial communication should disclose any pertinent relationship which is not apparent.

ANNOTATION 7-2. "Indirect compensation" is any consideration received from any source in relation to

an assignment for which the actuary provides professional services, other than direct billing for those services.

ANNOTATION 7-3. Actuaries employed by firms which operate in multiple sites are subject to the requirement of disclosure of sources of compensation which the actuary's firm may receive in relation to professional services with respect to a specific assignment for that client, regardless of the location in which such compensation is received.

Conflicts of Interest

PRECEPT 8. An actuary shall not perform professional services involving an actual or potential conflict of interest unless:

(a) the actuary's ability to act fairly is unimpaired and

(b) there has been full disclosure of the conflict and

(c) all direct users have expressly agreed to the performance of the services by the actuary.

ANNOTATION 8-1. An actuary has an obligation to observe standards of professional conduct whether serving as a consultant or employee. A client or employer is the direct user of the actuary's services when the direct user has the opportunity to select the actuary and is in a position to communicate directly with the actuary about qualifications, work and recommendations.

ANNOTATION 8-2. If the actuary is aware of any significant conflict between the interests of the client or employer and the interests of another party, the actuary should advise the client or employer of the conflict and should, if appropriate, include qualifications or disclosures in any related actuarial communication.

ANNOTATION 8-3. An actuary shall not use a relationship with a third party to obtain unduly favorable treatment from such third party on behalf of a client or employer.

Control of Work Product

PRECEPT 9. An actuary shall not perform professional services when the actuary has reason to believe that they may be used to violate or to evade the law.

ANNOTATION 9-1. Material prepared by an actuary may be used by another party in a way which may influence the actions of a third party. The actuary should recognize the risks of misquotation, misinterpretation or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly and that the actuary is identified as the source of the material.

PRECEPT 10. An actuary shall not disclose to another party any confidential information obtained through a professional assignment performed for a client or employer unless authorized to do so by the client or employer or required to do so by law.

ANNOTATION 10-1. The term "confidential information" as used in the Code of Professional Conduct refers to information not in the public domain of which the actuary becomes aware during the course of rendering professional services to a client or employer. It may include information of a proprietary nature, information which is legally restricted from circulation, or information which the actuary has reason to believe that the client or employer would not wish to be divulged.

Courtesy and Cooperation

PRECEPT 11. An actuary shall perform professional services with courtesy and shall cooperate with others in the client's or employer's interest.

ANNOTATION 11-1. Differences of opinion among actuaries may arise particularly in choices of assumptions and methods. Discussion of such differences, whether directly between actuaries or in observations made to a client by one actuary on the work of another, should be conducted objectively and with courtesy.

ANNOTATION 11-2. An actuary in the course of employment or an engagement may encounter a situation such that the best interest of the employer or client would be served by the actuary's setting out an alternative opinion to one expressed by another actuary together with an explanation of the factors which lend support to the alternative opinion. Nothing in the Code of Professional Conduct should be construed as preventing the actuary from expressing such an alternative opinion to the client or employer.

ANNOTATION 11-3. A principal (any present or prospective employer) has an indisputable right to choose a professional advisor. An actuary may provide service to any principal who requests it even though such principal is being or has been served by another actuary in the same matter.

If an actuary is invited to advise a principal for whom the actuary knows or has reasonable grounds to believe that another actuary is already acting in a professional capacity with respect to the same matter or has recently so acted, it may be prudent to consult the other actuary both to prepare adequately for the assignment and to make an informed judgement whether there are circumstances as to potential violations of the Code of Professional Conduct which might affect acceptance of the assignment.

The prospective new or additional actuary should request the principal's consent to such consultation. When the principal has given consent, the original actuary may require reasonable compensation for the work required to assemble and transmit the relevant information such as pertinent data, work papers and documents. The actuary need not include any items of a proprietary nature, such as computer programs.

Advertising

PRECEPT 12. An actuary shall not engage in any advertising or business solicitation activities in respect of professional services that the actuary knows or should know are false or misleading.

ANNOTATION 12-1. The term "advertising" as used in the Code of Professional Conduct encompasses all communications by whatever medium, including oral communications, which may directly or indirectly influence any person or organization to decide whether there is a need for actuarial services or to select a specific person or firm to perform actuarial services. The intent is to discourage advertising which contains any statements or claims which are in any material respect false, fraudulent, misleading or deceptive.

Titles and Designations

PRECEPT 13. An actuary shall make use of those membership titles and designations of an actuarial organization only where that use conforms to the practices authorized by that organization.

ANNOTATION 13-1. The term "title" as used in the Code of Professional Conduct means any title conferred by an actuarial organization related to a specific position within that organization. The term "designation" means a specific reference to membership status within an actuarial organization.

Collateral Obligations

PRECEPT 14. An actuary shall be deemed to have contravened the Code of Professional Conduct and shall

be subject to the profession's disciplinary procedures if the actuary pleads or is found guilty of any misdemeanor related to financial matters or any felony.

PRECEPT 15. An actuary with knowledge of a material violation of this Code shall disclose such suspected violation to the appropriate counseling and discipline body of the profession, except where the disclosure would divulge confidential information or be contrary to law.

ANNOTATION 15-1. For violations of this Code arising in the United States, the actuary should refer the matter to the Actuarial Board for Counseling and Discipline. For violations of this Code arising in Canada, the actuary should follow procedures established by the Canadian Institute of Actuaries.

ANNOTATION 15-2. A material violation of this Code is one which is important, has influence or effect, or impacts on the merits of a situation, as opposed to one which is trivial, does not affect an outcome, or is one merely of form.

ANNOTATION 15-3. Disclosure of a fellow professional's material violation of this Code may be a matter of law as well as ethics. An actuary faced with a decision whether or not to disclose the violation should consider seeking legal counsel; action may bring the possibility of a defamation suit; inaction may bring civil charges or charges of professional misconduct.

PRECEPT 16. An actuary or representative shall respond promptly in writing to any letter received from a person duly authorized by the appropriate counseling and disciplinary body of the profession to obtain information or assistance regarding possible violations of this Code.